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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/769,076	01/25/2001	Michael D. Krysiak	P/35-4	7143
7590 Philip M. Weiss, Esq. Weiss & Weiss 300 Old Country Road Suite 251 Mineola, NY 11501				
10/19/2011				
EXAMINER				
VALENTI, ANDREA M				
ART UNIT		PAPER NUMBER		
3643				
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

**Office Action Summary****Application No.**

09/769,076

**Applicant(s)**

KRYSIK ET AL.

**Examiner**

ANDREA VALENTI

**Art Unit**

3643

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 25 July 2011.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ An election was made by the applicant in response to a restriction requirement set forth during the interview on \_\_\_\_; the restriction requirement and election have been incorporated into this action.
- 4) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 5) ☒ Claim(s) 1-28,30,32,36-42,45-49,51 and 53-55 is/are pending in the application.
- 5a) Of the above claim(s) 1-25,36,37,39-42,45,46,48,49,51 and 53 is/are withdrawn from consideration.
- 6) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 7) ☒ Claim(s) 26-28,30,32,38,47,54 and 55 is/are rejected.
- 8) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 9) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 10) ☐ The specification is objected to by the Examiner.
- 11) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 12) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-83/06)  
Paper No(s)/Mail Date \_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_

**DETAILED ACTION**

***Claim Rejections - 35 USC § 112***

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claim 55 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The specification does not support the newly added limitation that the colored mulch changes back to its initial color, i.e. said colored mulch indicates to a user lack of moisture content by changing its color back to said initial color.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 26, 27, 28, 30, 38, 54, 55 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 6,021,598 to Holton in view of U.S. Patent No. 5,766,312 to Furhmann et al.

Regarding Claims 26, 27, 28, 30, Holton teaches a colored mulch product consisting essentially of; a material comprising a fiber cellulose, clay, loam, sand, and/or a combination of same (Holton abstract); and a dye and/or pigment (Holton Col. 4 line 8-10); said mulch product not being in a form of a mat (Holton Col. 6 line 1-24); comprising; nitrogen, phosphorous, and potassium fortifiers (Holton Col. 5 line 47).

Holton teaches the importance of moisture (Holton Col.1 line 18-19 and Col. 2 line 65) and teaches applying a dye to the mulch (Holton Col.4 line 8). Holton is silent on explicitly teaching said dye indicates to a user moisture content of the soil where said mulch is placed; said dye indicates to a user the acidity of said soil; said dye indicates to a user the chemical content of said soil. However, Fuhmann teaches the old and notoriously well-known general knowledge of dyes that are moisture indicators (Fuhmann Col. 2 line 10-29). Thus, Fuhmann teaches a moisture indicator dye that indicates moisture content, acidity, and chemical content (water/moisture can be taken to satisfy the broad term chemical). It would have been obvious to one of ordinary skill in the art to modify the teachings of Holton with the teachings of Fuhmann at the time of the invention for the known advantage of the known indicator properties of the dye. The modification is merely the simple substitution of one known dye for another to obtain predictable results.

Regarding Claim 38, Holton as modified teaches said mulch is the same or similar color of an actual plant, flower, fruit or vegetable of a seed planted with said mulch to indicate what is planted underneath the mulch. (Holton Col. 4 line 8-10).

Regarding Claim 54, Holton as modified teaches a colored mulch: said colored mulch acting as a visual indicator (Furhmann Col. 2 line 10-29) for moisture content of soil; said colored mulch being applied to said soil (Holton abstract); said colored mulch having an initial color; moisture being added (Holton Col. 2 line 35-38) to said mulch so that said mulch becomes a second color; said second color indicating to a user said moisture content of said soil.

Regarding Claim 55, Holton as modified teaches said colored mulch indicates to a user lack of moisture content by changing its color back to said initial color (Furhmann Col. 2 line 10-29 and abstract).

Claim 32 is rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 6,021,598 to Holton in view of U.S. Patent No. 5,766,312 to Furhmann et al as applied to claim 26 above, and further in view of U.S. Patent No. 5,734,167 to Skelty.

Regarding Claim 32, Holton as modified teaches coloring the mulch, but is silent on the dye is florescent. However, Skelty teaches it is old and notoriously well-known to dye agricultural products with florescent dye the mulch to glow in the dark (Skelty Col. 1 line 35-45). It would have been obvious to one of ordinary skill in the art to further modify the teachings of Holton with the teachings of Skelty at the time of the invention since the modification is merely the selection of a known alternate coloring for the advantage of enabling safe night time agricultural operations as taught by Skelty (Skelty Col. 1 line 1-26).

Claim 47 is rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 4,067,140 to Thomas in view of U.S. Patent No. 5,766,312 to Furhmann et al.

Regarding Claim 47, Thomas teaches a colored mulch product (Thomas abstract) comprising: a material comprising a fiber cellulose (Thomas abstract first line), clay, loam, sand, and/or a combination of same; and a dye and/or pigment (Thomas Col. 1 line 35) produced by a lifting and tumbling agglomeration operation (Thomas Col. 2 line 65-66).

Thomas is silent on explicitly teaching said dye indicates to a user by changing colors moisture content of the soil where said mulch is place. However, Furhmann teaches the old and notoriously well-known general knowledge of dyes that are moisture indicators (Furhmann Col. 2 line 10-29). Thus, Furhmann teaches a moisture indicator dye that indicates moisture content, acidity, and chemical content (water/moisture can be taken to satisfy the broad term chemical). It would have been obvious to one of ordinary skill in the art to modify the teachings of Holton with the teachings of Furhmann at the time of the invention for the known advantage of the known indicator properties of the dye. The modification is merely the simple substitution of one known dye for another to obtain predictable results.

Claims 26, 27, 28, 30, 38 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 6,021,598 to Holton in view of U.S. Patent No. 6,019,062 to Lombard et al.

Regarding Claim 26, 28, 30, Alternatively, Holton teaches a colored mulch product (Holton abstract) consisting essentially of: a material comprising a fiber cellulose, clay, loam, sand, and/or a combination of same; and a dye and/or pigment (Holton Col. 4 line 8-10). Holton teaches a dye, but is silent on the dye **indicates** to a user moisture conditions of the soil where said mulch is placed; the dye **indicates** to a user the acidity of said soil; or the dye **indicates** to a user the chemical content of said soil.

However, Lombard et al teaches a dye indicator i.e. a pH indicating dye for application to cellulosic material such as paper (Lombard Col. 2 line 1-5 and Col. 2 line 11-15; Col. 2 line 60-67). It would have been obvious to one of ordinary skill in the art to modify the teachings of Holton with the teachings of Lombard at the time of the invention since the modification is merely an engineering design choice involving the selection of a known alternate dye selected for the known advantage of monitoring pH levels as taught by Lombard and is an environmentally safe dye as taught by Lombard (Lombard abstract). The main constituent of urine is water, averaging around 95% of the composition of urine, thus when indicating urine it indicates moisture too.

Regarding Claim 27, Holton as modified teaches the mulch comprising; nitrogen, phosphorous, and potassium fortifiers (Holton Claim 8).

Regarding Claim 38, Holton as modified teaches the mulch is the same or similar color of an actual plant, flower, fruit, or vegetable of a seed planted with the mulch (Holton Col. 4 line 8-10).

Claim 32 is rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 6,021,598 to Holton in view of U.S. Patent No. 6,019,062 to Lombard et al as applied to claim 26 above, and further in view of U.S. Patent No. 5,734,167 to Skelty.

Regarding Claim 32, Holton as modified teaches coloring the mulch, but is silent on the dye is florescent. However, Skelty teaches it is old and notoriously well-known to dye agricultural products with florescent dye allowing the mulch to glow in the dark (Skelty Col. 1 line 35-45). It would have been obvious to one of ordinary skill in the art to further modify the teachings of Holton with the teachings of Skelty at the time of the invention since the modification is merely the selection of a known alternate coloring for the advantage of enabling safe night time agricultural operations as taught by Skelty (Skelty Col. 1 line 1-26).

Claim 26, 27, 28, 30, 38, 47 and 54 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 4,067,140 to Thomas in view of U.S. Patent No. 6,019,062 to Lombard et al.

Regarding Claim 26, 27, 28, 30, 38, 47 and 54, Thomas teaches a colored mulch product (Thomas abstract) comprising: a material comprising a fiber cellulose (Thomas abstract first line), clay, loam, sand, and/or a combination of same; and a dye and/or pigment (Thomas Col. 1 line 35) produced by a lifting and tumbling agglomeration operation (Thomas Col. 2 line 65-66. Thomas is silent on explicitly teaching the dye indicates to a user by changing colors the moisture content of the soil where the mulch is placed. However, Lombard et al teaches a dye indicator i.e. a pH indicating dye for

application to cellulosic material such as paper (Lombard Col. 2 line 1-5 and Col. 2 line 11-15; Col. 2 line 60-67). It would have been obvious to one of ordinary skill in the art to modify the teachings of Thomas with the teachings of Lombard at the time of the invention since the modification is merely an engineering design choice involving the selection of a known alternate dye selected for the known advantage of monitoring pH levels as taught by Lombard. The main constituent of urine is water, averaging around 95% of the composition of urine, thus when indicating urine it indicates moisture too.

Claim 32 is rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 4,067,140 to Thomas in view of U.S. Patent No. 6,019,062 to Lombard et al as applied to claim 26 above, and further in view of U.S. Patent No. 5,734,167 to Skelty.

Regarding Claim 32, Thomas as modified teaches coloring the mulch, but is silent on the dye is florescent. However, Skelty teaches it is old and notoriously well-known to dye agricultural products with florescent dye allowing the mulch to glow in the dark (Skelty Col. 1 line 35-45). It would have been obvious to one of ordinary skill in the art to further modify the teachings of Thomas with the teachings of Skelty at the time of the invention since the modification is merely the selection of a known alternate coloring for the advantage of enabling safe night time agricultural operations as taught by Skelty (Skelty Col. 1 line 1-26).

### ***Response to Arguments***

Applicant's arguments filed 25 July 2011 have been fully considered but they are not persuasive.

Applicant references page 15 of the specification for support for the new limitations of claim 55 that the mulch changes its color back to its initial color. However, page 15 of the specification merely states that the dye changes color or becomes visible. The specification does not state that the dye changes back to its initial color. The specification only references a one way change in color, not a round trip. The examiner does not find applicant's arguments convincing and maintains the rejection as set forth in the above paragraphs.

The issue at hand here is not what Mr. Holton intended by his dye in '598, but would one of ordinary skill in the art be motivated to make such a substitution/combination. Mr. Holton merely teaches it is preferred dying the mulch an aesthetically acceptable color of green. Thomas teaches merely dying the mulch a pleasing color and cites green as an example, but does not limit the color to green (Thomas abstract). Thomas further states selecting a dye that is merely an eye appealing color (Thomas Col. 2 line 51-52).

Both primary references, Thomas and Holton, teach the basic known concept of coloring mulch utilizing a dye i.e. general knowledge of one of ordinary skill in the art to dye mulch a desired color. Merely selecting an alternate color to produce a desired aesthetic effect and/or to utilize known properties of a dye as intended does not teach away from the teachings of Holton and Thomas. One of ordinary skill in the art would be motivated to select an alternate dye such as indicator dye for the known indicator properties taught by Furhmann and Lombard.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

In response to applicant's argument that there is no teaching, suggestion, or motivation to combine the references, the examiner recognizes that obviousness may be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988), *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992), and *KSR International Co. v. Teleflex, Inc.*, 550 U.S. 398, 82 USPQ2d 1385 (2007). In this case, obviousness is established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. The motivation found in the teachings of Furhmann is the selection of a dye that is a moisture indicator (Furhmann Col. 2 line 9-29) and the motivation found in Lombard is a visual pH indicator for a cellulose based material. Both Furhmann and Lombard teach known dyes. The modification to Holton and/or Thomas is merely the selection of a known alternate dye for an alternate desired/pleasing aesthetic effect and for the known indicator properties. This

combination use motivation found both in the references themselves and in knowledge generally available to one of ordinary skill in the art.

Furthermore, aesthetic changes do not present patentably distinct limitation over the prior art of record [*In re Seid*, 161 F.2d 229, 231, 73 USPQ 431, 433 (CCPA 1947)]. Both Holton and Thomas teach that the dye is an aesthetic feature. Therefore, merely changing the aesthetic feature utilizing an alternate known dye does not present a patentably distinct limitation and does not teach away.

The examiner reiterates that since the main constituent of urine is water, averaging around 95% of the composition of urine, thus when indicating urine it indicates moisture too. The examiner maintains that combination of Holton/Thomas with the teachings of Lombard as presented in the above paragraphs.

Skelty explicitly teaches the advantage of enabling safe night time agricultural operations (Skelty Col. 1 line 1-26).

Examiner maintains that applicant has not patentably distinguished over the teachings of the cited prior art of record.

### ***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within

TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ANDREA VALENTI whose telephone number is (571)272-6895. The examiner can normally be reached on 8:00am-6:30pm Mon..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Peter M. Poon can be reached on 571-272-6891. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Andrea M. Valenti/

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11 October 2011